Kenneth Teh Ah Kiam & Anor (Receivers and Managers of Global Pacific Textile Industries Sdn Bhd, in receivership) v Ketua Pengarah Jabatan Kastam & Eksais & Ors

FEDERAL COURT (KUALA LUMPUR) — SUPREME COURT CIVIL APPEAL NO 01-68 OF 1993
ANUAR CJ (MALAYA), MOHD AZMI AND ZAKARIA YATIM FCJJ
1 DECEMBER 1997

Companies and Corporations *— Receivership — Priorities — Whether customs duties and sales tax leviable against debtor company and Employees Provident Fund contributions payable by debtor company had priorities of payment over debts due to debenture holders and costs and expenses incurred by receivers and managers — Sales Tax Act 1972 ss 23 & 70 — Customs Act 1967 ss 11 & 65 — Employees Provident Fund Act 1991 s 51 — Government Proceedings Act 1956 s 10 — Companies Act 1965 ss 191 & 292*

Companies and Corporations *— Receivership — Priorities — Seizure of goods by customs department before crystallization of debentures in satisfaction of sales taxes due — Whether goods seized form part of assets of floating charge for distribution by receivers*

The appellants were appointed by the debenture holders as receivers and managers of the debtor company. The value of realizable assets in their hands, including the value of goods seized by the customs department under the Sales Tax Act 1972 ('the STA') prior to the date of crystallization of the debentures, were insufficient to meet all the claims of the debenture holders, the Director General of Customs & Excise, the Employees Provident Fund Board and their own claims of professional fees and expenses incurred in the receivership. The respondents had claimed priority of payment under the relevant provisions of the Customs Act 1967 ('the CA'), the STA, the Employees Provident Fund Act 1991 ('the EPF Act') and under s 10 of the Government Proceedings Act 1956 ('the GPA'). On the contrary, the appellants relied on s 191 read together with s 292(1) of the Companies Act 1965 to claim for higher priorities for their own professional costs and expenses of receivership as well debts due to the debenture holders.

The appellants applied to the High Court for directions under s 183(3) of the Companies Act 1965, namely whether customs duties and sales tax leviable against the debtor company under the CA (ss 11 and 65) and the STA (ss 23 and 70) respectively, and Employees Provident Fund ('EPF') contributions payable by the debtor company under the EPF Act (ss 51 and 65) had priorities of payment over debts due to the debenture holders and costs and expenses incurred by the receivers and managers. The judge made declaratory orders (see [1994] 3 MLJ 175) to the effect that customs duties, sales taxes and EPF contributions had priorities over debts due to the debenture holders and the receivers and managers' costs and expenses. On the issue of goods of the debtor company that had been seized by the

customs department on account of sales taxes, the judge declared that they should be excluded from the assets of the floating charge and the proceeds of sale of such goods be paid to meet the sales tax liability of the debtor company. The appellants appealed. A

Held, allowing the appeal in part: B

(1) The provision of s 292 of the Companies Act 1965 must necessarily prevail over the provision of s 10 of the GPA on priority of payment in a liquidation situation, and the same applied to a receivership situation by virtue of s 191 of the Companies Act 1965 (see p 300H); *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation)* [1995] 2 MLJ 600 and *Abdul Samad bin Hj Alias v The Government of Malaysia & Ors* [1996] 3 MLJ 581 followed. C

(2) Sections 23, 69 and 70 of the STA have nothing at all to do with the issue of priority of payment. Thus, unless s 10 of the GPA is successfully brought into operation, there is nothing in the STA itself to confer any priority of payment to the unsecured debts due to the federal government. Since it was conceded that s 10 of the GPA had no application, federal tax assessed under the STA could not claim overall priority of payment without contravening s 292(1) priorities. Similarly, there is nothing in ss 11 and 65 of the CA to give priority of payment of customs duties as unsecured debts to the government. Again, the inability to invoke s 10 of the GPA would cripple the respondents' case. As such, the priority of payment in respect of federal taxes assessed under any written law must rank in accordance with s 292(1) of the Companies Act 1965. In the circumstances, the trial judge erred in law in directing the customs duties and the sales taxes leviable against the debtor company to have priority of payment over debts due to the debenture holders and the receiver's costs and expenses (see pp 300I and 301A–E). D E F

(3) Section 51 of the EPF Act has nothing to do with priority of payment in a receivership or liquidation of a company. There is nothing in the EPF Act itself to give priority of payment to the EPF Board. On the contrary, s 191(1) of the Companies Act 1965 itself confers priority to EPF contributions payable by the employer over any claim of the debenture holders. In the circumstances, the EPF contributions in the present appeal must necessarily fall under s 292(1)(e) of the Companies Act 1965 for purpose of priority over all other unsecured debts in the event where there is insufficiency of realizable assets in the floating charge to meet all claims. Since EPF contributions are expressly included for priority purposes under s 191(1), there is no reason why such contributions should be excluded from s 292(1) unless expressly so provided by Parliament. In the circumstances, as far as the claim of the EPF Board was concerned, the order of the trial judge should be set aside on the ground that the contributions G H I

under the EPF Act payable by the debtor company do not have priority over the receivers' costs and expenses under s 292(1) of the Companies Act 1965, although they do have priority of payment over debts due to the debenture holders in respect of principal or interest under the debentures (see p 302C–G).

(4) On the basis of the nemo dat rule, the goods seized by the customs department in satisfaction of sales taxes due to government prior to the date of appointment of the receivers and managers could no longer form part of the floating charge if the seizure and sale of the goods had been lawfully carried out under s 30(1) and (2) of the STA. Until crystallization of the debentures, the licence given by the debenture holders to the debtor company to utilize the assets in the floating charge and meet its legal objection in the ordinary course of business remains without restriction or limitation. Hence, once the goods were lawfully seized, the debenture holders could no longer be in a position to give any rights in the seized goods to the debtor company as part of the assets under the floating charge. Since they were no longer capable of conferring any licence in the goods to the debtor company once the goods had actually been seized and physically removed, such goods or the proceeds thereof can no longer be part of the assets of the floating charge for distribution by the receivers. As such, the question of priority of payment does not really arise in respect of such goods. The customs department was entitled to them or their proceeds as of right and not on account of any priority of payment.

In the circumstances, apart from the goods which had been seized by the customs department, the remaining goods and other realizable assets in the floating charge must be distributed in accordance with the priorities as set out in ss 191 and 292(1) of the Companies Act 1965 (see pp 303F–I and 304A–B); *Public Finance Bhd v Scotch Leasing Sdn Bhd (In Receivership) (Perwira Habib Bank Malaysia, Intervener)* [1996] 2 MLJ 369 followed.

Obiter:

According to authorities, even if the seized goods or some of them had not been sold when the receivers made their claim — as is contended in the present case — the court would have the discretion, in the absence of special circumstances, to allow the sale of the goods to be proceeded with (see p 303B).

[Bahasa Malaysia summary

Perayu-perayu telah dilantik oleh pemegang debentur sebagai penerima dan pengurus syarikat penghutang. Nilai aset yang boleh direalisasikan dalam tangan mereka, termasuk nilai barangan yang disita oleh jabatan kastam di bawah Akta Cukai Jualan 1972 ('ACJ') sebelum tarikh penghabluran debentur-debentur, tidak mencukupi bagi memenuhi semua tuntutan pemegang debentur, Ketua Pengarah

Jabatan Kastam & Eksais, Lembaga Kumpulan Wang Simpanan Pekerja dan tuntutan mereka sendiri untuk yuran profesional dan perbelanjaan yang ditanggung dalam penerimaan. Penentang-penentang telah menuntut keutamaan ke atas bayaran di bawah peruntukan relevan Akta Kastam 1967 ('AK'), ACJ, Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta KWSP') dan di bawah s 10 Akta Prosiding Kerajaan 1956 ('APK'). Sebaliknya, perayu-perayu bergantung kepada s 191 dibaca bersama s 292(1) Akta Syarikat 1965 untuk menuntut keutamaan yang lebih tinggi untuk kos profesional mereka sendiri dan perbelanjaan penerimaan serta hutang yang harus dibayar kepada pemegang debentur.

Perayu-perayu memohon kepada Mahkamah Tinggi untuk arahan di bawah s 183(3) Akta Syarikat 1965, iaitu sama ada cukai kastam dan cukai jualan yang boleh dikenakan terhadap syarikat penghutang di bawah AK (ss 11 dan 65) dan ACJ (ss 23 dan 70) masing-masing, dan caruman Kumpulan Wang Simpanan Pekerja ('KWSP') yang harus dibayar oleh syarikat penghutang di bawah Akta KWSP (ss 51 dan 65) mempunyai keutamaan bayaran atas hutang yang harus dibayar kepada pemegang debentur dan kos dan perbelanjaan yang ditanggung oleh penerima dan pengurus. Hakim membuat perintah perisytiharan (lihat [1994] 3 MLJ 175) dengan keputusan bahawa cukai kastam, cukai jualan dan caruman KWSP mempunyai keutamaan atas hutang yang harus dibayar kepada pemegang debentur dan kos dan perbelanjaan penerima dan pengurus. Mengenai isu barangan syarikat penghutang yang disita oleh jabatan kastam berdasarkan cukai jualan, hakim mengisytiharkan bahawa mereka harus dikecualikan daripada aset caj terapung dan hasil jualan barangan itu dibayar bagi memenuhi liabiliti cukai jualan syarikat penghutang. Perayu-perayu membuat rayuan.

Diputuskan, membenarkan sebahagian rayuan:

(1) Peruntukan s 292 Akta Syarikat 1965 mestilah secara perlu mengatasi peruntukan s 10 APK tentang keutamaan bayaran dalam keadaan penyelesaian, dan yang sama terpakai kepada keadaan penerimaan disebabkan s 191 Akta Syarikat 1965 (lihat ms 300H); *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation)* [1995] 2 MLJ 600 dan *Abdul Samad bin Hj Alias v The Government of Malaysia & Ors* [1996] 3 MLJ 581 diikut.

(2) Seksyen-seksyen 23, 69 dan 70 ACJ tiada kena-mengena langsung dengan isu keutamaan bayaran. Justeru itu, melainkan s 10 APK boleh beroperasi, tiada apa-apa dalam ACJ sendiri yang mengurniakan sebarang keutamaan bayaran kepada hutang-hutang tidak bercagar yang harus dibayar kepada kerajaan persekutuan. Oleh kerana ia telah diakui bahawa s 10 APK tidak terpakai, cukai kerajaan yang ditaksir di bawah ACJ tidak boleh menuntut bayaran keutamaan keseluruhan tanpa melanggar keutamaan s 292(1). Begitu juga, tiada apa-apa dalam ss 11 dan 65 AK yang memberikan keutamaan bayaran cukai kastam sebagai

hutang tidak bercagar kepada kerajaan. Sekali lagi, ketidakupayaan untuk menggunakan s 10 APK akan melumpuhkan kes penentang-penentang. Oleh itu, keutamaan bayaran berkenaan dengan cukai persekutuan yang ditaksir di bawah mana-mana undang-undang bertulis mestilah menurut s 292(1) Akta Syarikat 1965. Dalam keadaan ini, hakim perbicaraan terkhilaf dari segi undang-undang dalam mengarahkan cukai kastam dan cukai jualan yang boleh dikenakan terhadap syarikat penghutang supaya mempunyai keutamaan bayaran atas hutang yang harus dibayar kepada pemegang debentur dan kos dan perbelanjaan penerima (lihat ms 300I dan 301A–E).

(3) Seksyen 51 Akta KWSP tiada kena-mengena dengan keutamaan bayaran dalam penerimaan atau penyelesaian sesebuah syarikat. Tiada apa-apa dalam Akta KWSP sendiri yang memberikan keutamaan kepada Lembaga KWSP. Sebaliknya, s 191(1) Akta Syarikat 1965 sendiri mengurniakan keutamaan kepada caruman KWSP yang harus dibayar oleh majikan ke atas apa-apa tuntutan pemegang debentur. Dalam keadaan ini, caruman KWSP dalam rayuan ini mestilah diliputi di bawah s 292(1)(e) Akta Syarikat 1965 untuk tujuan keutamaan ke atas semua hutang tidak bercagar yang lain andainya kekurangan aset yang boleh direalisasikan dalam caj terapung untuk memenuhi segala tuntutan. Oleh kerana caruman KWSP termasuk secara nyata untuk tujuan keutamaan di bawah s 191(1), tiada sebab mengapa caruman sedemikian harus dikecualikan daripada s 292(1) melainkan diperuntukkan secara nyata oleh Parlimen. Dalam keadaan ini, sejauh mana tuntutan Lembaga KWSP adalah berkenaan, perintah hakim perbicaraan patut diketepikan atas alasan bahawa caruman di bawah Akta KWSP yang harus dibayar oleh syarikat penghutang tidak mempunyai keutamaan ke atas kos dan perbelanjaan penerima di bawah s 292(1) Akta Syarikat 1965, walaupun mereka mempunyai keutamaan bayaran hutang yang harus dibayar kepada pemegang debentur berkaitan dengan prinsipal atau faedah di bawah debentur-debentur (lihat ms 302C–G).

(4) Berdasarkan rukun nemo dat, barangan yang disita oleh jabatan kastam demi memenuhi cukai jualan yang harus dibayar kepada kerajaan sebelum tarikh pelantikan penerima dan pengurus tidak lagi boleh membentuk sebahagian daripada caj terapung sekiranya penyitaan dan jualan barangan telah dilakukan dengan sahnya di bawah s 30(1) dan (2) ACJ. Sehingga penghabluran debentur, lesen yang diberikan oleh pemegang debentur kepada syarikat penghutang untuk menggunakan aset dalam caj terapung dan memenuhi bantahan sah dalam perjalanan biasa perdagangan kekal tanpa sekatan atau had. Justeru itu, sebaik sahaja barangan disita dengan sahnya, pemegang debentur tidak lagi boleh memberikan apa-apa hak dalam barangan yang disita kepada syarikat penghutang sebagai sebahagian daripada aset di bawah caj terapung. Oleh kerana mereka tidak lagi berupaya mengurniakan sebarang lesen dalam barangan kepada syarikat

penghutang sebaik saja telah disita dan dialihkan secara fizikal, barangan atau hasil jualan demikian tidak lagi membentuk sebahagian aset caj terapung untuk pembahagian oleh penerima. Oleh itu, persoalan keutamaan bayaran tidak benar-benar timbul berkaitan barangan sedemikian. Jabatan kastam berhak mendapatkannya atau hasil jualan dan bukan berdasarkan sebarang keutamaan bayaran.

Dalam keadaan-keadaan ini, selain daripada barangan yang telah disita oleh jabatan kastam, barangan yang dibiarkan dan aset yang boleh direalisasikan yang lain dalam caj terapung mestilah dibahagikan menurut keutamaan seperti yang dinyatakan dalam ss 191 dan 292(1) Akta Syarikat 1965 (lihat ms 303F–I dan 304A–B); *Public Finance Bhd v Scotch Leasing Sdn Bhd (In receivership) (Perwira Habib Bank Malaysia, Intervener)* [1996] 2 MLJ 369 diikut.

Obiter:

Menurut autoriti, sekalipun barangan yang disita atau yang di antaranya tidak dijual apabila penerima membuat tuntutan — seperti yang dihujahkan dalam kes ini — dalam ketiadaan keadaan istimewa, mahkamah mempunyai budi bicara untuk membenarkan jualan barangan diteruskan (lihat ms 303B).]

Notes

For cases on priorities, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 397–408.

Cases referred to

Abdul Samad bin Hj Alias v The Government of Malaysia & Ors [1996] 3 MLJ 581 (folld)

Anuarul Aini & Anor v Ketua Pengarah Kastam Dan Eksais DiRaja, Malaysia Johore Bahru [1991] 1 MLJ 360 (not folld)

Chuah Teong Hooi & Anor v Employees Provident Fund Board [1990] 2 MLJ 218 (refd)

Croshaw v Lyndhurst Ship Co [1897] 2 Ch 154 (refd)

Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation) [1995] 2 MLJ 600 (folld)

Public Finance Bhd v Scotch Leasing Sdn Bhd (In receivership) (Perwira Habib Bank Malaysia, Intervener) [1996] 2 MLJ 369 (folld)

Robson v Smith [1895] 2 Ch 118 (refd)

Legislation referred to

Companies Act 1965 ss 183(3), 191, 292(1)
Customs Act 1967 ss 11, 65
Employees Provident Fund Act 1991 ss 51, 65, 66
Government Proceedings Act 1956 s 10
Sales Tax Act 1972 ss 23, 30, 70

Appeal from: Originating Summons No R2–24–115 of 1992 (High Court, Kuala Lumpur)

A *Izabella De Silva* (*Raja Darryl & Loh*) for the appellants.
Allaudeen Ismail (Senior Federal Counsel) for the first and second respondents.
Das (*Shook Lin & Bok*) for the third respondent.

B *Cur Adv Vult*

Mohd Azmi FCJ (delivering the judgment of the court): This appeal involves another dispute concerning priority of payment between competing claims faced by the receivers and managers of a company in receivership under the Companies Act 1965. Mr Kenneth Teh Ah Kiam and Mr Chin
C Kwai Yoong (the appellants/plaintiffs) were appointed on 16 March 1992 under two debentures secured by a floating charge by the Hongkong and Shanghai Banking Corporation Ltd and the Pacific Bank Bhd ('the debenture holders') as receivers and managers of Global Pacific Industries Sdn Bhd ('the debtor company'). After their appointment, they discovered — as is often the case in a receivership — that the value of realizable assets
D in their hands, including the value of goods seized by the customs department under the Sales Tax Act 1972 prior to the date of crystallization of the debentures, were insufficient to meet all the claims of not only the debenture holders, but also the Director General of Customs and Excise, the Employees Provident Fund Board and their own claims of professional
E fees and expenses incurred in the receivership. As at July 1992, the estimated realizable assets of the debtor company in their hands was in the region of RM11,248,000 which consisted of:

(i) the sum of RM10,222,000 being estimated sum realizable from fixed assets, ie fixed charge assets; and

F (ii) the sum of RM1,026,000 being the estimated sum realizable from assets subject to the floating charge under the debentures.

By para 7 of their joint affidavit, Mr Kenneth Teh and Mr Chin deposed that there were insufficient funds from the assets of the debtor company to pay all the claims alleged by the respondents/defendants 'from the floating
G charge under the debentures'. The claims according to para 4 were as follows:

(a) the sum of RM122,388.79 claimed by the Director General of Customs and Excise being the customs duties leviable;

H (b) the sum of RM972,338.06 claimed by the Director General of Customs and Excise being the sales tax leviable; and

(c) the sum of RM835,600 claimed by the Employees Provident Fund Board being the employees' provident fund contributions payable.

As at 31 October 1992, the amount due to the two debenture holders were
I RM4,989,710.69 (Hongkong & Shanghai Banking Corporation Ltd) and RM6,291,809.03 (Pacific Bank Bhd) totalling RM11,281,519.72 which far exceeded the sum of RM1,026,000 realizable from the assets subject to the floating charge. The respondents/defendants have claimed priority of payment not only under the relevant provisions of the Customs Act 1967, the Sales Tax 1972 and the Employees Provident Fund Act 1991 ('the EPF Act'), but also under s 10 of the Government Proceedings Act 1956.

On the contrary, the appellants/plaintiffs relied on s 191 read together with s 292(1) of the Companies Act 1965, to claim for higher priorities for their own professional costs and expenses of receivership and as well debts due to the debenture holders, as compared to EPF contributions, and federal taxes in the form of sales tax and customs duties, which ranked second last and last respectively. A B

It was under these bleak financial circumstances that the receivers and managers applied to the High Court by originating summons dated 29 December 1992 for directions under s 183(3) of the Companies Act 1965 in connection with priority of payment between the various claimants, which may be summarized as follows: C

(1) Whether customs duties leviable against the debtor company under the Customs Act 1967, in particular ss 11 and 65, have priority of payment over:
   (a) debts due to the debenture holders including claims for principal and interests; and D
   (b) cost and expenses incurred by receivers and managers in the course of receivership.

(2) Whether sales tax leviable against the debtor company under the Sales Tax Act 1972, in particular ss 23 and 70, have priority of payment over the debts due to the debenture holders, and the receivers and managers as stated in paras (1)(a) and (1)(b) above. E

(3) Whether Employees Provident Fund ('EPF') contributors payable by the debtor company under the EPF Act, in particular ss 51 and 65, have priority of payment over the debts due to the debenture holders and the receivers and managers as stated in paras (1)(a) and (1)(b) above. F

(4) In the event that the court does hold under paras (1), (2) and (3) that the customs duties, sales taxes and EPF contributions have priorities over the debts due to the debenture holders and to the receivers and managers, which of the said customs duties, sales taxes and EPF contributions leviable rank in priority and their ranking of the same vis-a-vis one another. G

(5) For other consequential directions and orders.

On 1 November 1993, Wan Adnan J (as he then was) gave judgment for the defendants (see [1994] 3 MLJ 175) when he made various declaratory orders to the effect that customs duties and sales taxes, and as well as EPF contributions payable by the debtor company had priorities over the debts due to the debenture holders and to the receivers and managers' costs and expenses. H

On the issue of goods of the debtor company that had been seized by the customs department under s 30 of the Sales Tax Act 1972 on account of sales taxes, the learned judge declared that they should be excluded from the assets of the floating charge and the proceed of sale of such goods be paid to meet the sales tax liability of the debtor company under the said Act. I

A As regards priorities between the defendants inter se, the learned judge ordered priority of payment be given to the EPF Board, and priority between the two federal taxes — the customs duties and sales taxes — be paid pari passu.

The learned judge also ordered the costs of application be paid from B the assets of the debtor company before distribution to the defendants according to the decreed priorities. Mr Kenneth Teh and Mr Chin are dissatisfied with the whole decision of the learned judge and have appealed to this court.

Now dealing first with the priority of payment ordered by the learned C judge in favour of the sales tax over the debts due to the debenture holders and as well the receivers and managers' costs and expenses, it is clear from the grounds of judgment of the learned judge dated 23 May 1994 that his Lordship was merely following as he was bound to do, the then current decision of the High Court in *Anuarul Aini & Anor v Ketua Pengarah Kastam Dan Eksais DiRaja, Malaysia Johore Bahru* [1991] 1 MLJ 360 D which had then gone up to the then Supreme Court on appeal and summarily upheld. In that case, it was the opinion of James Foong JC (as he then was) that s 10 of the Government Proceedings Act 1956 would give the customs department the right to an overall priority of payment, as the sales tax in question was incurred before the crystallization of the debenture and as such constituted a debt due to government within the E meaning of s 10 which provides:

> (1) All debts due and claims owing from time to time by any person to the Government, whether upon judgment, bond, or other specialty, or upon simple contract or otherwise, shall be entitled from the date of the accrual thereof, respectively, to a preference of payment over all debts F or claims of every kind which shall, subsequent to such date, have been contracted or incurred by or become due from such person to any other person whomsoever.
>
> (2) Nothing herein contained shall affect any right vested in any person by virtue of a mortgage or charge of immovable property duly registered in the manner provided by law for the registration of such mortgage or G charge.

In other words, it was held in *Anuarul Aini*'s case that the ranking of the priorities given by s 191 read with s 292(1) of the Companies Act 1965 to certain debts over all other unsecured debts, must give way to the priority of government debts conferred by s 10 of the Government Proceedings H Act 1956. However, much water has passed under the bridge since *Anuarul Aini* was upheld summarily by the then Supreme Court. His Lordship Wan Adnan FCJ, subsequently sitting in the Federal Court, has had the opportunity to review the legal effect of the inter-play between the two legislation on the issue of priority of payment in a receivership situation in I the case of *Abdul Samad bin Hj Alias v The Government of Malaysia & Ors* [1996] 3 MLJ 581, wherein this court followed its earlier decision in *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation)* [1995] 2 MLJ 600 where it was laid down by Wan Yahya FCJ that when a company is in liquidation, federal taxes under the

Sales Tax Act 1972 do not have overall priority of payments purely on the basis of s 10 of the Government Proceedings Act 1956 in disregard of the special and specific provision on priorities under s 292(1) of the Companies Act 1965. It also held that s 69 of the Sales Tax Act 1972 had nothing to do with priority of payment in companies' liquidation. The following headnotes of MLJ in *Ler Cheng Chye* at p 600 adopted by *Abdul Samad* would be useful:

(1) In terms of its construction, s 69 of the Sales Tax Act 1972 is directive in nature and merely directs the setting aside of moneys sufficient for taxation, but does not provide that government debts shall rank in priority to all other secured debts. If the Legislature had intended otherwise, it would have conferred that privilege in clear and unequivocal words. The proper provisions to apply in deciding the priority of payments in respect of the sales tax debt are ss 291 and 292 of the Companies Act 1965.

(2) Section 10(1) of the Government Proceedings Act 1956 provides in general terms that all debts due to the Government shall enjoy preferential payments over other competing debts which arise subsequently. In contrast, ss 291 and 292 of the Companies Act 1965 are special provisions dealing with the respective rights of secured and unsecured creditors in an insolvent company, and they expressly rank federal tax sixth in priority amongst other unsecured debts. When the floating charge crystallized, the debenture holders became secured creditors, whereas the sales tax claim by the Customs remained an unsecured civil debt.

(3) Discernibly, there is a conflict between s 292(1) and s 10(1). In this situation, the general rule of construction that applies is *specialia generalibus derogant* — special provisions derogate from general provisions. Hence, if a special provision is in conflict with an earlier general provision, the special provision will be treated as an exception to the general provision, and it follows that s 292(1) of the Companies Act 1965 must be read as an exception to the general provision of s 10(1) of the Government Proceedings Act 1956.

(4) In the present appeal, this intention was made even clearer by s 213 of the Companies Act 1965, which expressly binds the government to the priority of debts as provided in the Companies Act 1965. Also, if the Government debts are to be paid in preference of the cost and expense of winding up, and if the funds available are limited, no winding up can be proceeded with, as there will be no funds to pay even for the filing fees of the petition and the liquidator's fee.

The principle on priority of payment in *Ler Cheng Chye* was thus extended and applied to a receivership situation by *Abdul Samad* by virtue of s 191 read together with s 292 of the Companies Act 1965 which provide:

191 Payments of certain debts out of assets subject to floating charge in priority to claims under charge

(1) Where a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge or possession is taken by or on behalf of debenture holders of any property comprised in or subject to a floating charge, then if the company is not at the time in the course of being wound up, debts which in every winding up are

preferential debts and are due by way of wages salary vacation leave or superannuation or provident fund payments and any amount which in a winding up is payable in pursuance of section 292(3) or (5) shall be paid out of any assets coming to the hands of the receiver or other person taking possession in priority to any claim for principal or interest in respect of the debentures and shall be paid in the same order of priority as is prescribed by that section in respect of those debts and amounts.

(2) For the purpose of subsection (1) the references in section 292(1)(b), (c), (d) and (e) to the commencement of the winding up shall be read as a reference to the date of the appointment of the receiver or of possession being taken as aforesaid (as the case requires).

(3) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors.

292 Priorities

(1) Subject to this Act, in a winding up there shall be paid in priority to all other unsecured debts —

(a) firstly, the costs and expenses of the winding up including the taxed costs of a petitioner payable under section 220, the remuneration of the liquidator and the costs of any audit carried out pursuant to section 281;

(b) secondly, all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, of any employee, not exceeding one thousand five hundred ringgit [or such other amount as may be prescribed from time to time] whether for time or piecework in respect of services rendered by him to the company within a period of four months before the commencement of the winding up;

(c) thirdly, all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of the winding up;

(d) fourthly, all remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before the commencement of the winding up;

(e) fifthly, all amounts due in respect of contributions payable during the twelve months next before the commencement of the winding up by the company as the employer of any person under any written law relating to employees superannuation or provident funds or under any scheme of superannuation or retirement benefit which is an approved scheme under the federal law relating to income tax; and

(f) sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.

(2) The debts in each class specified in subsection (1) shall rank in the order therein specified but as between debts of the same class shall rank equally between themselves, and shall be paid in full, unless the property of the company is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

It is also convenient to reproduce the following relevant headnotes Nos (1), (2), (3) and (4) of *Abdul Samad* at p 582:

(1) It must now be regarded as settled that ss 69 and 70 of the Sales Tax Act 1972 do not operate to confer any priority for sales tax over other debts and that s 292(1) of the Companies Act 1965 must be read as an exception to the general provisions of s 10(1) of the Government Proceedings Act 1956; *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation)* [1995] 2 MLJ 600 followed.

(2) It is erroneous to say that the provisions of ss 191 and 292 of the Companies Act 1965 do not apply. Once a receiver has been appointed, ss 191 and 292 will come into play. Whilst it is true that a taxable person collects the sales tax for the government, the government cannot claim priority over such monies once a receiver has been appointed. The argument will be tenable only if the monies collected by Rajiv as sales tax were put into a separate special account. But there is no evidence that monies collected as sales tax were put into such an account. They must have been put into the mixed account of Rajiv.

(3) Therefore, the trial judge was wrong in directing that sales tax due to the government be paid in priority to the claim of the debenture holder.

(4) Since the claim by the employees for the sum of RM21,000 was agreed to by the appellant, there was therefore no dispute between the appellant and the employees that the employees were entitled to be paid that sum in priority to the claim of the debenture holder. But the employees are only entitled to be paid out of floating charge realizations and not out of fixed charge realizations.

Encik Allaudeen Ismail, Senior Federal Counsel appearing for the Ketua Pengarah Jabatan Kastam and Eksais (Director General of Customs and Excise) and the Federal Government, conceded in his submission that the appeal should be allowed in so far as the s 10 argument for priority of federal taxes is concerned based on the authority of this court in *Abdul Samad*. We are similarly of the opinion that there is no valid reason to reconsider *Ler Cheng Chye* or *Abdul Samad* on the inter-play between s 10 of the Government Proceedings Act 1956 and s 292 of the Companies Act 1965. The latter provision must necessarily prevail on priority of payment in a liquidation situation, and the same applied to a receivership situation by virtue of s 191 of the Companies Act 1965. Nor are we persuaded by the feeble attempt to review this court's interpretation of ss 23, 69 and 70 of the Sales Tax Act 1972. It should be noted that the three sections mentioned by Mr Kenneth Teh and Mr Chin in their application for directions have nothing at all to do with the issue of priority of payment. Section 23 merely provides for the recovery of sales tax as a civil debt due to the government, whilst ss 69 and 70 deal with the duty of liquidators and receivers to notify the Director General of Customs and Excise of

A their appointment within 14 days and also the duty before disposing of any of the assets to set aside such sum out of the assets as appears to the Director General to be sufficient to provide for any such tax. Thus, unless s 10 of the Government Proceedings Act 1956 is successfully brought into operation, there is nothing in the Sales Tax Act 1972 itself to confer the unsecured debts due to the federal government any priority of payment. B Since it is conceded that s 10 of the 1956 Act has no application, federal tax assessed under the Sales Tax Act 1972 cannot claim overall priority of payment without contravening s 292(1) priorities.

Similarly, there is nothing in ss 11 and 65 of the Customs Act 1967 to give priority of payment of customs duties as unsecured debts to the C government. The two sections mentioned by Mr Kenneth Teh and Mr Chin merely relate to the power of the Minister to fix customs duties by orders to be approved by the Dewan Rakyat, and the power of the Director General of Customs to collect taxes in relation to dutiable goods in licensed warehouses. Again, the inability to invoke s 10 of the Government D Proceedings Act 1956 would cripple the respondent's case. As such, the priority of payment in respect of federal taxes assessed under any written law must rank in accordance with s 292(1) of the Companies Act 1965.

In the circumstances, the learned trial judge in the court below erred in law in directing the customs duties and the sales taxes leviable against the debtor company to have priority of payment over not only the debts E due to the debenture holders, but also over the receiver's costs and expenses. Under s 292(1) read with s 191 the Companies Act 1965, the customs duties and sales taxes in the form of federal government taxes would rank sixth in terms of priority of payment to all other unsecured debts.

F The next question is the contributions under the EPF Act, payable by the debtor company, which the learned judge ordered to have priority over the debts due to the debenture holders, and also over the costs and expenses of the receivers and managers. In making this order, the learned judge had relied specifically on his own judgment in *Chuah Teong Hooi & G Anor v Employees Provident Fund Board* [1990] 2 MLJ 218. In that case, it was argued for the receivers and managers that although claim by the EPF Board admittedly ranked in priority to the claim of the debenture holders, the receivers' costs and expenses had an overall priority. Wan Adnan J (as he then was) rejected the receivers' claim to priority as regards their costs and expenses, and on appeal to the then Supreme Court, the decision was H summarily upheld. In argument, Ms Izabella refers to ss 51, 65 and 66 of the EPF Act, and whilst agreeing to the social nature of the legislation in the protection of workers' rights, she argued that s 292(1) of the Companies Act 1965 expressly allows the EPF Board priority for only 12 months contributions. Mr Das for the EPF Board, argued that employers contributions under the EPF Act should be excluded from the priority I under s 292(1) para (a), on the basis of s 51 of the EPF Act which provides:

> 51 Contributions and deposits not to be assigned or attached
>
> Notwithstanding anything to the contrary contained in any other written law —

(a) no sum deducted from the wages of a member of the Fund under section 48; A
(b) no amount payable by the employer as his contribution; and
(c) no amount standing to the credit of a member of the Fund,

shall be assignable, transferable, liable to be attached, sequestered, levied upon, for, or in respect of, any debt or claim whatsoever, nor shall the Official Assignee be entitled to or have any claim on any such sum or amount. B

In our view, s 51 merely deals with the prohibition against assignment or attachment of EPF contributions and it has nothing to do with priority of payment in a receivership or liquidation of a company, when there is insufficient fund to meet all claims from the assets of a floating charge C under a debenture. As in the case of the Customs Act 1967 and the Sales Tax Act 1972, there is nothing in the EPF Act itself to give priority of payment to the EPF Board. On the contrary, s 191(1) of the Companies Act 1965 itself confers priority to EPF contributions payable by the employer over any claim of the debenture holders for principal or interest, as was conceded by both parties in *Chuah Teong Hooi*. In the circumstances, D the EPF contributions in the present appeal must necessarily fall under s 292(1)(e) of the Companies Act 1965 for purpose of priority over all other unsecured debts, in the event such as at present, where there is insufficiency of realizable assets in the floating charge to meet all claims. We do not accept Mr Das' argument that contributions under the EPF Act E should be excluded from the priorities enacted in s 292(1). Since EPF contributions are expressly included for priority purposes under s 191(1), there is no reason why such contributions should be excluded from s 292(1) unless expressly so provided by Parliament. In the circumstances, as far as the claim of the EPF Board is concerned, we agree that the order of the learned judge in the court below should be set aside on the ground F that the contributions under the EPF Act payable by the debtor company do not have priority over the receivers' costs and expenses under s 292(1) of the Companies Act 1965, although they do have priority of payment over debts due to the debenture holders in respect of principal or interest under the debentures. G

As it is our conclusion that customs duties, sales taxes and EPF contributions do not have priority of payment over receivers' costs and expenses, and only the EPF contributions have priority over claims of the debenture holders, the fourth direction sought by Mr Kenneth Teh and Mr Chin in their originating summons would not arise. H

One distinct feature in this appeal is the fact that the assets in the floating charge which the debenture holders are claiming also include those that have been lawfully seized by the customs department under s 30 of the Sales Tax 1972, prior to the crystallization of the debentures on 16 March 1992, viz the date on which the receivers and managers were appointed by the debenture holders. It was not seriously disputed that the I goods were seized during three separate occasions on 6 and 8 March 1992, and 10 March 1993. The learned judge in his grounds of judgment had referred to various authorities to support his finding that such goods,

having been seized prior to the date of crystallization towards payment of sales tax would cease to be part of the assets in the floating charge on the date of crystallization of the debentures (see judgment of Romer J in *Robson v Smith* [1895] 2 Ch 118). According to authorities, even if the seized goods or some of them had not been sold when the receivers made their claim, as is contended in the present case, the court would have the discretion, in the absence of special circumstances, to allow the sale of the goods to be proceeded with (see *Croshaw v Lyndhurst Ship Co* [1897] 2 Ch 154).

In a similar argument raised in *Public Finance Bhd v Scotch Leasing Sdn Bhd (In Receivership) (Perwira Habib Bank Malaysia, Intervener)* [1996] 2 MLJ 369, Peh Swee Chin FCJ, delivering the judgment of the Federal Court, said at pp 381–382:

> When the debenture was executed by the leasing company on 11 June 1985, the undisputed assignments of the 21 leasing agreements had taken place on various dates in 1983 and 1984, so that applying the nemo dat rule, the floating charge created by the execution of the debenture could not cover the book debts in respect of the 21 leasing agreements for there was nothing left then in regard to the 21 agreements for the floating charge to cover.
>
> Likewise, when the floating charge was crystallized on 28 October 1986 on the appointment of a receiver and manager, the debenture holder did not obtain a fixed charge over the same debts in these 21 leasing agreements; for there could be no fixed charge on some assets which the leasing company had parted to somebody else earlier, ie the assignee.

On the basis of the nemo dat rule, the goods seized by the customs department in satisfaction of sales taxes due to government prior to the date of appointment of the receivers and managers, could no longer form part of the floating charge, if the seizure and sale of the goods had been lawfully carried out under s 30(1) and (2) of the Sales Tax Act 1972. Until crystallization of the debentures, the licence given by the debenture holders to the debtor company to utilize the assets in the floating charge and meet its legal objection in the ordinary course of business, remains without restriction or limitation. Hence, once the goods were lawfully seized, the debenture holders could no longer be in a position to give any rights in the seized goods to the debtor company as part of the assets under the floating charge. Since they were no longer capable of conferring any licence in the goods to the debtor company, once the goods had actually been seized and physically removed, such goods or the proceeds thereof can no longer be part of the assets of the floating charge for distribution by the receivers.

We accordingly agree with the learned trial judge that the goods which had been actually seized (even if not yet sold) to meet sales tax liabilities prior to the date of crystallization of the debentures, would cease to be part of the assets in the floating charge under the debentures for purpose of distribution by the receivers. As such, the question of priority of payment does not really arise in respect of such goods. In the result, although we reject the argument under s 10 of the Government Proceedings Act 1956 as the basis of the learned judge's conclusion, we agree for different reason with that part of his findings that the seized goods no

longer formed part of the floating charge assets at the commencement of the receivership, and therefore the customs department was entitled to them or their proceeds as of right and not on account of any priority of payment. In the circumstances, apart from the goods which had been seized by the customs department, the remaining goods and other realizable assets in the floating charge must be distributed in accordance with the priorities as set out in ss 191 and 292(1) of the Companies Act 1965.

We therefore allow this appeal in part. We set aside all the orders made by the court below except the direction of the learned judge concerning the goods seized from the debtor company by the customs department under s 30 of the Sales Tax Act 1972, which was ordered to be excluded from the assets in the floating charge. The orders set aside are substituted with the following orders and directions:

(1) Customs duties and sales taxes leviable against the debtor company under the Customs Act 1967 and the Sales Tax Act 1972 respectively have no priority of payment over either:

  (a) debt due to the debenture holders including claims for principal or interest; or

  (b) costs and expenses incurred by the receivers and managers in the course of receivership.

(2) Employees Provident Fund contributions payable by the debtor company under the EPF Act have priority over the debenture holders' claims for principal or interest in respect of the debentures, but they have no priority of payment over their claims for costs and expenses of the receivers and managers.

(3) The EPF contributions payable by the debtor company under the EPF Act have priority over customs duties and sales taxes, but limited to the amounts due in respect of contributions payable during the 12 months next before the commencement of the receivership as provided under s 292(1)(e).

(4) As regards priority between the two federal taxes inter se due to insufficient funds to meet the customs duties and sales taxes, they shall abate in equal proportions between themselves as provided by s 292(2) of the Companies Act 1965.

(5) The goods seized from the debtor company prior to the date of crystallization of the debentures by the customs department under s 30 of the Sales Tax Act 1972 shall be excluded from the assets of the floating charge under the debentures, and proceeds from the sale of the said goods shall be applied by the Director General of Customs and Excise to meet the sale tax liabilities of the debtor company incurred prior to the date of commencement of the receivership.

As regards costs, we order that each party in the proceedings should pay its own costs both here and in the court below. The costs of the application by the receivers be paid from the assets of the debtor company before distribution, and the deposit shall be refunded to the appellants.

Appeal allowed in part.

Reported by Jafisah Jaafar